88-292
CASE NO. _____

SUPREME COURT OF THE UNITED STATES

TERM: OCTOBER, 1988

BARBARA CONNER,

RESPONDENT,

V.

RUDY G. REINHARD AND THE ESTATE OF RICHARD J. ZOLPER, DECEASED, THROUGH AND BY IRENE M. ZOLPER, THE PERSONAL REPRESENTATIVE OF THE ESTATE OF RICHARD J. ZOLPER,

PETITIONERS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

WRIT OF CERTIORARI

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QUESTIONS FOR REVIEW

A. Did the Appeals Court properly apply the qualified immunity rule of Harlow v. Fitzgerald, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982), to a Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977), fact situation?

1. Did the Appeals Court err in holding that Pickering v. Board of Education, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968), and its progeny were sufficiently particularized to put petitioner Reinhard on notice that his conduct was unlawful in May of 1982?

2. Did the Appeals Court err in viewing all evidence in a light most favorable to respondent, or should it have considered the

objective reasonableness of the petitioner's action in light of all evidence?

3. Did the Appeals Court err in failing to address petitioner Reinhard's contention that he fired the respondent for insubordination under an objective standard of reasonableness?

4. Did the Appeals Court err in finding that sufficient evidence existed to find a cause of action existed against petitioner Zolper?

B. Did the Appeals Court err in holding that privity for the purpose of res judicata depends on whether an official is sued in his personal capacity or official capacity?

LIST OF PARTIES

The parties to this proceeding include exclusively those listed in the caption of this case.

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TABLE OF AUTHORITIES

OFFICIAL AND UNOFFICIAL REPORTS OF OPINION

The ruling of the Eastern District Court of the State of Wisconsin in the matter of Conner v. City of Green Bay, Case No. 83-C-414, in a final judgment dated November 6, 1984. No decision was published.

The rulings of the Eastern District Court of the State of Wisconsin in the instant case (Conner v. Reinhard, et al., Case No. 85-C-719) were handed down on April 18, 1986 (res judicata) and March 26, 1987 (qualified immunity). No decisions were published.

The decision of the Seventh Circuit dated May 19, 1988, is found at Conner v. Reinhard, et al., Case No. 87-1940 (1988).

STATEMENT OF GROUNDS FOR JURISDICTION

Petitioners appeal from the judgment of the Honorable Seventh Circuit Court

of Appeals dated May 19, 1988.

No request for rehearing was made by petitioners. However, a motion to stay the mandate of the Court of Appeals was filed on June 9, 1988, and granted.

Jurisdiction in the Supreme Court is sought by writ of certiorari pursuant to Title 28 U.S.C. Section 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. First Amendment of the U. S. Constitution.

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

B. Title 42, United States Code, Section 1983.

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or

other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

STATEMENT OF THE CASE

In February of 1982, respondent, Barbara Conner, was employed by the City of Green Bay as a Clerk-Steno II. During her probationary period (the first six months) her immediate supervisor was petitioner Rudy Reinhard.

In addition to her office duties, respondent also took minutes for the City's Board of Ethics. On May 12, 1982, at such a meeting, during suspension of rules respondent elected to comment on one of the issues before the Board of Ethics. She personally transcribed what was said:

"Conner: I work for Rudy and I know that the Contingency Fund is not for this purpose.

Camilli: Your name, please, for the record.

Conner: Barbara Conner, 215 North Van Buren. I'm a citizen of Green Bay.

Camilli: You're also a city employee?

Conner: I'm a city employee and I have some concern about how we spend tax money.

Camilli: And you're aware of the Contingency Fund because of your work in the Comptroller's Office, is that correct?

Conner: Right. And I take the minutes of the Finance Committee meeting and I know the reticence with which they dip into the Contingency Fund."

Petitioner Zolper, an alderman for the City of Green Bay, was at that meeting of the Board of Ethics and appeared to be angry with respondent.

On May 13, 1982, petitioner Zolper met with petitioner Reinhard in Reinhard's office. There were no witnesses to the conversation, but the respondent assumes that the petitioners were talking about her.

On May 19, 1982, petitioner Reinhard gave respondent Conner the following letter:

> "In reference to the remark concerning the use of the Contingency Fund attributed to you at the May 12th, 1982, Board of Ethics Meeting, I must advise you that it was a case of poor judgment on your part when you expressed the views of the Comptroller's Office while acting as Recording Secretary for that Committee. If you had been attending the hearing not as the Recording Secretary but as a private citizen your personal viewpoint would have been more appropriate.
>
> In the future I would caution you, while acting as the Recording Secretary, not to speak for the Comptroller's Office unless questioned directly.
>
> I am sorry this situation arose and hope to avoid a similar situation in the future."

Petitioner Reinhard met with respondent, and in response to respondent's question concerning what the letter meant, he stated that she should not speak on his behalf without prior authorization. Respondent's undisputed response was that she would do the same thing again. Respondent then asked petitioner Reinhard if she should look for another job. Petitioner Reinhard did not discourage her. Shortly thereafter, without having received any notice of termination from any official of the City, respondent Conner held a press conference and stated that she had been fired.

In addition, she wrote a long letter dated May 20, 1982, to petitioner Reinhard. She delivered this letter to the Mayor although it was addressed to petitioner Reinhard. In it she expressed her dismay at petitioner

Reinhard having "no consideration for my right as an individual to express an opinion..." She stated that if Reinhard checked the recording of her remarks it would be clear that she was speaking as a citizen of Green Bay.

After hearing of Conner's "discharge" through the media and eventually receiving a copy of Conner's letter to him from the Mayor, petitioner Reinhard reviewed respondent Conner's past work history, his conversations with her, and her correspondence. Based on that consideration, he believed that respondent Conner was either being insubordinate or was simply refusing to listen to what he felt was a reasonable instruction and determined that plaintiff was not an employee he wished to have working in his department. Consequently, he discharged the respondent by letter dated May 24, 1982.

On March 17, 1983, respondent commenced Case No. 83-C-414 in the Eastern District Court of Wisconsin naming the City of Green Bay as the sole defendant (Appendix p. 76). After respondent concluded the presentation of her case, the City moved for summary judgment on the basis of respondent's failure to show that any injury to respondent was occasioned by the operation of an established policy, practice, or procedure of the City. The City's motion was granted on November 6, 1984, and the case dismissed.

On May 10, 1985, respondent commenced Case No. 85-C-719 naming Rudy Reinhard and Richard Zolper as defendants (hereinafter the "instant case"). Jurisdiction is alleged through 28 U.S.C. §1331 and 42 U.S.C. §1981 et seq. (Appendix p. 53). The second action alleged in virtually identical wording

the same injury to the same respondent by the same actors.

On December 4, 1985, petitioners moved for summary judgment on the basis of res judicata. This motion was denied by the court's decision of April 18, 1986 (Appendix p. 43).

On January 22, 1987, petitioners moved for summary judgment on the basis of qualified immunity. The District Court granted that motion in a decision dated March 26, 1987 (Appendix p. 30). After a motion to reconsider was denied, respondent appealed the March 26, 1987, decision and subsequent judgment of dismissal pursuant to 28 U.S.C. §1291 on June 10, 1987, to the Seventh Circuit Court of Appeals.

Petitioners raised the res judicata issue in the appeal, but in a May 19, 1988, decision, the Seventh Circuit reversed the decision of the District

Court and remanded this matter for trial. It is from that decision that petitioners seek this writ.

ARGUMENT FOR ALLOWANCE

A. The definition and applicability of the term privity in the context of claim preclusion merits review by this court.

In the case below, the Seventh Circuit made two holdings in regard to privity for the purposes of res judicata:

> 1. Where both cases have been brought in federal courts, res judicata must be decided in terms of federal law. Conner v. Reinhard, et al., Case No. 87-1940 (7th Cir. 1988) pp. 18-19
>
> 2. A government and its officers are generally not in privity for purposes of res judicata. (emphasis ours) Conner, supra, p. 20

Petitioners do not argue that federal law should be the source of the rule determining the res judicata issue in the present case. However, what constitutes the federal law in regard to

privity in the context of res judicata is difficult to determine. This court last addressed this issue in the case of Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 402, 60 S.Ct. 907, 84 L.Ed. 1263, 1276 (1939), in which the court held:

> "The result is clear. Where the issues in separate suits are the same, the fact that the parties are not precisely identical is not necessarily fatal. (citations omitted) Identity of parties is not a mere matter of form but of substance. Parties normally the same may be, in legal effect, different...and parties nominally different may be, in legal effect, the same. A judgment is res judicata in a second action upon the same claim between the same parties or those in privity with them. (citations omitted) There is privity between officers of the same government so that a judgment in a suit between a party and a representative of the United States is res judicata in relitigation of the same issue between that party and another officer of the government."

The Sunshine, supra, rule is often cited in conjunction with the following quote of Cromwell v. County of Sac, 94

U.S. 351, 24 L.Ed. 195, 197 (1877), which stated:

> "The doctrine of res judicata is that a final judgment on the merits in a court of competent jurisdiction bars the same parties or their privies from relitigating not only the issues which were in fact raised and decided but also all other issues which could have been raised in the prior action."

Reading these precedents together, they imply that if the factual basis of the cases (the claims) are essentially the same in both suits, the parties need not be identical. That is if the same actors performed the same alleged wrong in both suits, the heading of the suit and legal strategy in selecting the defendant does not defeat the application of res judicata.

Following Sunshine, supra, almost verbatim, the Seventh Circuit held in the case of Mandarino v. Pollard, 718 F.2d 845, 850 (7th Cir. 1983):

"A government and its officers are in privity for purposes of res judicata."

This reading of Sunshine, supra, has been the rule in the Seventh Circuit in Lee v. Peoria, 685 F.2d 196 (7th Cir. 1982); Warren v. McCall, 709 F.2d 1183 (7th Cir. 1983); the Sixth Circuit in Ohio v. Menard, 766 F.2d 236 (6th Cir. 1985); the Ninth Circuit in Arevalo v. Woods, 811 F.2d 487 (9th Cir. 1987); and the Fourth Circuit in Thurston v. U.S., 810 F.2d 438 (4th Cir. 1987).

Some decisions, however, have begun to depart from or at least distinguish the Sunshine, supra, rule. The Eighth Circuit in the case of Headley v. Bacon, 828 F.2d 1272 (8th Cir. 1987), distinguished Sunshine, supra, as being based on collateral estoppel law as opposed to claim preclusion law. From there, the Headley, supra, court determined that in cases where a

governmental official is sued in a personal capacity, the court must consider on a case-by-case basis if the relationship between the parties is sufficiently close to render them in privity or (in Sunshine, supra, terms) to determine if the parties are the same in "legal effect". See also Micklus v. Greer, 705 F.2d 314 (8th Cir. 1983).

A third view of the privity issue is voiced in the First Circuit in the case of Roy v. City of Augusta, 712 F.2d 1517 (1st Cir. 1983), in which the court, basing its decision on the law of the State of Maine, specifically held that under well established rules of res judicata, an action brought against an individual in one capacity does not bar a later action brought against the same individual in a different capacity.

Consequently, there is no concise federal common law dealing with the

definition of the term "privity". For the sake of consistency alone, it is imperative that the Supreme Court clarify the application of res judicata in civil rights actions.

Recently this Court has further clarified the distinction between official and personal capacity suits and the elements of a suit against a public entity [St. Louis v. Praprotnik, 108 S.Ct. 915, 99 L.Ed.2d 107 (1988)]. With these issues focused, the time is ripe to determine if a plaintiff must bring an action simultaneously against public employees and officials or if separate suits will be permitted. Because of the duty to defend statutes (see, for example, §895.42, Wis Stats.), clarification of the res judicata issue is essential to determine feasible insurance coverage for "future" suits

and actual costs and liabilities for pending actions.

The confusion created by the inconsistent application of the Sunshine, supra, rule in several Circuits must be resolved. A decision in the instant case by this Court will clarify the federal common law regarding the application of the Sunshine, supra, rule and define with some finality how res judicata will operate in federal civil rights lawsuits brought separately against a government and its officials.

B. This court must review and clarify the precise manner of applying the qualified immunity defense.

In the case of Harlow v. Fitzgerald, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982), at p. 2738, this court established the rule of qualified immunity:

> "We therefore hold that government officials performing discretionary functions generally are shielded from liability for

civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known...(citations omitted)"

Harlow, supra, suggests the standard of proof to be used in applying the qualified immunity defense is unique:

"It is not difficult for an ingenious plantiff's counsel to create a material issue of fact on some element of the immunity defense where subtle questions of constitutional law and a decision-maker's mental process are involved. A sentence from a casual document or a difference in recollection with regard to a particular policy conversation held long ago would usually, under normal summary judgment standards, be sufficient [to force a trial]..." (p. 2738, S.Ct.)

In the subsequent case of Mitchell v. Forsyth, 472 U.S. 511, 86 L.Ed.2d 411, 105 S.Ct. 2806 (1985), at p. 425 L.Ed., this court held:

"The entitlement is an immunity from suit rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial."

It is, therefore, clear that the qualified immunity defense must be decided on a motion for summary judgment. What is not clear is precisely the legal burdens and evidentiary rules used in determining the qualified immunity defense.

The Circuits differ on what evidence should even be considered in determining the qualified immunity issue. The First Circuit Rule restricts the facts to those alleged in the pleadings [see Bonitz v. Fair, 804 F.2d 164 (1st Cir. 1986); Austin Mutual Securities, Inc. v. National Association of Securities Dealers, Inc., 757 F.2d 676 (5th Cir. 1985)]. Another view permits the motion after limited discovery based solely on evidence relevant to the qualified immunity defense [see Martin v. D.C. Metropolitan Police Department, 812 F.2d 1425 (D.C. Cir., 1987)]. Still other

Circuits are unclear but seem to require the motion to be brought anytime before trial based on varying evidentiary standards [Benson v. Allphin, 786 F.2d 276 n.19 (7th Cir.), cert. denied, 107 S.Ct. 172 (1986); Creamer v. Porter, 754 F.2d 1311 (5th Cir. 1985)]. Finally, this court, in Anderson v. Creighton, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987), supported the position permitting discovery; although this opinion seems limited to Fourth Amendment cases.

The Circuits also differ on what standard of proof is to be applied to the qualified immunity elements. Many Circuits hold that facts must be viewed in the light most favorable to the defendant to determine both if the right was clearly established and if the public official should have known the act violated that right [see Gutierrez v. Municipal Court of the Southeast

District, County of Los Angeles, 838 F.2d 1031 (9th Cir. 1988); Miller v. Solem, 728 F.2d 1020 (8th Cir. 1983); Green v. Carlson, 826 F.2d 647 (7th Cir. 1987)]. Other Circuits read Harlow, supra, much more restrictively and hold the qualified immunity defense must be reviewed under standards different from those of ordinary summary judgment. In Martin, supra, the Court held:

> "We recognize that in an ordinary case, where 'the inferences to be drawn from the underlying facts...must be drawn in the light most favorable' to the opponent of the summary judgment motion...
>
> * * *
>
> This is not, however, an ordinary case...The Supreme Court's 'strong condemnation of insubstantial suits against government officials,' Krohn v. United States, 742 F.2d 24, 31 (1st Cir. 1934), impels the application of a standard more demanding of plaintiffs when public officer defendants move for summary judgment on the basis of their qualified immunity." (p. 1435)

Consequently, this Court should consider and conclusively decide under what specific standard of proof is a qualified immunity issue to be considered.

Finally, the interplay of a state-of-mind element further confuses the issue. Where state of mind is an element of the plaintiff's case, some courts have required the plaintiff to show evidence of such state of mind as part of their "proof" in a qualified immunity case or at least require the court to determine if the defendant "should have known" of the existence of the right violated [see Hobson v. Wilson, 737 F.2d 1 (D.C. Cir. 1984); Creamer, supra, Martin, supra; and Miller, supra]. On the other hand, some courts have held that proof relating to state of mind should not be considered (see Gutierrez, supra).

The instant case is one which requires the application of the rule of Mt. Healthy, supra. The Mt. Healthy, supra, rule requires plaintiff to show that the conduct was protected and that the conduct was a substantial motivating factor in the decision to discharge. Consequently, a Mt. Healthy, supra, case includes a state-of-mind consideration as part of plaintiff's case.

Inasmuch as the Supreme Court has never heard a qualified immunity case involving the Mt. Healthy, supra, rule, it is not clear how qualified immunity is to be applied in this context. The issue which should be addressed is what course of action should a court follow where the defendant in a Mt. Healthy, supra, case states facts suggesting he or she had a reasonable basis for not realizing his or her conduct violated a clearly established right and showing

that the discharge was not motivated by impermissible reasons. The rationale of Hobson, supra, Martin, supra, and Miller, supra, suggests the court can consider the reasonableness of the defenses and require something more than circumstantial or inferential support for plaintiff to defeat qualified immunity. This rationale supplies more protection to public officials and would probably result in less of these cases going to trial. If the rationale of Gutierrez, supra, is utilizied, the public official's motive would always be a question of fact, and qualified immunity could be defeated in a Mt. Healthy, supra, case simply by alleging that the discharge took place for unconstitutional reasons. [In an analogous view, see also Floyd v. Farrell, 765 F.2d 1 (1st Cir. 1985).] In either case, the law concerning the

application of qualified immunity in a Mt. Healthy, supra, case must be clarified.

This Court has repeatedly acknowledged the importance of qualified immunity as it affects the willingness of people to serve their government in a vigorous and deliberate manner [see Butz v. Economou, 438 U.S. 478, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1978); Pierson v. Ray, 386 U.S. 547, 554, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967)]. Based on protecting those interests, this court has recently created a new elevated standard of qualified immunity in the case of federal officers and Fourth Amendment cases (see Anderson v. Creighton, supra,). In contrast, the divergence of opinion in the Circuits is complicating the application of immunity and defeating the purpose of those protections. If qualified immunity is

to save the public-sector defendants from time-consuming litigation and high legal costs of meritless claims, the defense must be both readily understood and applied to circumstances confronting the employee.

Qualified immunity was based on the sound principle that public officials should be protected by a basic shield of reasonableness. The concept that those who represent us should be allowed to act in a manner which is reasonable, certainly is a desirable goal promoting both efficient, effective government and protecting civil rights.

This case presents in a concise and orderly manner issues which need to be resolved in clarifying the application of qualified immunity. By granting the writ, this court can address these issues and reestablish a consistent application of qualified immunity.

Dated at Green Bay, Wisconsin, this 15th day of August, 1988.

Respectfully submitted,

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